FILED

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No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY
a Delaware Corporation

Petitioner,

v.

JAMES M. JOHNSON and FRANCIS L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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40 pp

APPENDIX A

SUPREME COURT ORDER

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

JAMES M. JOHNSON AND FRANCES L. JOHNSON, as Representatives of the Estate of Jeremy Michael Johnson, Deceased — APPELLEES

V. — No. 84,527

MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware Corporation — APPELLANT

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

CERTIORARI DENIED
CONCUR: WILSON, C.J, KAUGER, VC.J., SIMMS, HARGRAVE, SUMMERS, WATT, JJ.
DISSENT: HODGES', LAVENDER, OPALA, JJ.

DATE ENTERED: October 16, 1996

/s/
ALMA WILSON
CHIEF JUSTICE

FILED SUPREME COURT
STATE OF OKLAHOMA
DATE: OCTOBER 16, 1996
JAMES W. PATTERSON, CLERK

APPENDIX B

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the Estate of Jeremy Michael Johnson, deceased,	)	
Appellees,	)	
vs.	)	No. 84,527
	)	NOT FOR PUBLICATION
MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation	)	
Appellant	)	

FILED COURT OF APPEALS
STATE OF OKLAHOMA
DATE: JULY 16, 1996
JAMES W. PATTERSON, CLERK

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA

Bill Settle
Settle & Landrum
Muskogee, Oklahoma

John W. Norman
Thomas A. Wallace
L. Mark Bonner

Charles F. Mosser
Norman, Edem, McNaughton
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Oklahoma City, Oklahoma — For Appellees

Richard E. Howard
Tom L. Armstrong
Kenneth J. Treece
Tom L. Armstrong & Associates
Tulsa, Oklahoma — For Appellant

MEMORANDUM OPINION

REIF, J.

Missouri Pacific Railroad company appeals the judgment entered against it in favor of the parents of Jeremy Johnson in this wrongful death lawsuit. Jeremy had been the driver of a pickup truck which was struck by a train at an unprotected crossing in Fort Gibson. After hearing the evidence, the trial court made a special finding that Parents had proven by clear and convincing evidence that Railroad's conduct evinced a wanton or reckless disregard for the rights of another, oppression, fraud or malice so as to allow the jury to return a verdict for punitive damages in excess of the actual damages awarded. While the jury found Jeremy and Railroad to be equally at fault, it found Railroad to be guilty of wanton, reckless, or intentional conduct and awarded punitive damages in excess of the actual damages.

Railroad's allegations of error on appeal can be categorized into errors concerning the admission of evidence and the conduct of the trial, and errors in the jury instructions. When addressing error in the admission of evidence and the conduct of the trail, the determinative issue is whether the trial judge abused his discretion in making his

rulings and whether the abuse materially affected the substantial rights of the complaining party. Lee v. Volkswagen of America, Inc., 688 P.2d 1283, 1290 (Okla. 1984); see also Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc., 713 P.2d 572 (Okla. 1985).

Without addressing each of the individual items of error alleged by Railroad, we would note that we have scrutinized the record on appeal and with the exception of the "speed issues," we find this case to have been well and fairly tried by both counsel and the trial court. We find no error in the trial court's rulings on the admissibility of evidence, the conduct of the trial itself, or the submission of the punitive damages claim.

The "speed issues" concern the application of a federal statutes found in the Federal Railroad Safety Act, formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994). The pertinent part states:

> § 20106. National uniformity of regulation
>
> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order

> related to railroad safety when the law, regulation, or order --
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United State Government; and
>
> (3) does not unreasonably burden interstate commerce.

Pursuant to this statute, the Secretary of Transportation promulgated regulations setting the maximum allowable operating speeds for trains according to the class or type of track upon which they operate. This statute has been interpreted by the United States Supreme Court in CSX Transportation v. Easterwood, 507 U.S. 658 (1993). The court held that "federal regulations adopted by the Secretary of Transportation pre-empt [a plaintiff's] negligence action only insofar as it asserts that [a defendant's] train was traveling at an excessive speed." Id. at 676. Our inquiry must then focus on whether the trial court's admission of evidence concerning the train's speed, Fort Gibson's train speed ordinance, and the alleged agreement by Railroad to abide by a lower speed limit was erroneous. Also involved in this inquiry is the trial court's instructions touching upon the speed issues. While it is apparent that Parents assert that the train was traveling at an excessive speed, their claim is not solely one for negligence due to excessive speed. Railroad had a duty to operate the train safely, with due regard for the locale and other conditions. Evidence of the train's actual speed, Railroad's policies concerning speed, Railroad's knowledge of the conditions at the Fort Gibson crossings including previous near misses, and evidence of Railroad's prior involvement and "agreement"

with the city of Fort Gibson concerning trains speed limits all are admissible to prove elements of negligence other than just negligence due to excessive speed. We find no error in the admission of evidence concerning the "speed issues."

Railroad's predominant allegation of error on appeal is that based upon federal preemption of speed regulation the trial court erred when it instructed the jury that failure of Railroad to comply with the Fort Gibson trains speed limit ordinance would be negligence per se. Because we are constrained by stare decisis to follow the supreme court's interpretation that the federal regulations preempt an action based on excessive speed alone, we must determine whether the giving of this instruction, while perhaps erroneous, was prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction. Oklahoma Ry. Co. v. Wilson, 231 P.2d 688 (Okla. 1951). When we consider that the jury found Jeremy to be equally negligent with Railroad for the collision, we cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudicial way. This is bolstered by the additional finding by both the trial court and the jury that Railroad was more than just grossly negligent. Both found the conduct of Railroad to be wanton, oppressive, malicious, reckless to the point of disregard for the rights of others, or, perhaps, even intentional as it concerned the operation of the train through Fort Gibson at the time of the collision with Jeremy. We are persuaded that the jury heard the evidence, understood the actions and obligations of the parties, and returned a verdict which reflected their judgment. We do not believe that the negligence per se instruction was so prejudicial in light of the rest of the instructions as to require reversal of the verdict. We also find that the trial court's entry of judgment on the verdict to be proper.

AFFIRMED.

TAYLOR, P.J., and RAPP, C.J., concur

July 16, 1996

APPENDIX C

JURY INSTRUCTION NO.: 24

NEGLIGENCE PER SE -- VIOLATION OF ORDINANCE (MODIFIED)

In addition to the duty to exercise ordinary care there are also duties imposed by statutes or ordinances. If you find that Missouri Pacific Railroad violated the following ordinance and the violation was the direct cause of the injury, then such violation in and of itself would make Missouri Pacific Railroad negligent. There was in force and effect in the City of Fort Gibson at the time of the occurrence the following ordinance:

Ordinance No. 1973-2-2: Section 1

> It is unlawful for any person, firm, or corporation to operate, drive or propel, or cause to be operated, driven or propelled any railway engine for a greater speed than forty (40) miles per hour when entering an intersecting street or avenue within the incorporated limits of the town of Fort Gibson, Muskogee County, Oklahoma.

Kurn v. Adair, 178 P.2d 104 (Okla. 1946);
Missouri-Kansas-Texas Railway Co. v. Dodson, 356 P.2d 1079 (Okla. 1960)

APPENDIX D

JURY INSTRUCTION NO.: 25

You are instructed that a state **[or municipality]** may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434

APPENDIX E

JURY INSTRUCTION No.: 26

If you find that the Walnut Street crossing constituted a specific individual hazard because unique local conditions presented local safety hazards, then Missouri Pacific Railroad had a duty to reduce its speed to the level specified in the Ft. Gibson City Ordinance.

CSX Transp., Inc. v. Easterwood, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); CSX Transp., Inc. v. Easterwood, 507 U.S. __, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)

APPENDIX F

JURY INSTRUCTION NO.: 28

If you find that Jeremy Michael Johnson was injured as a result of Missouri Pacific Railroad's failure to fulfill an agreement with the City of Fort Gibson to operate its trains at 40 miles per hour through the City of Fort Gibson and to look into correcting the blind corners at the railroad grade crossings in Fort Gibson then you may award those damages sustained as a result of such failure.

Brown v. Wichita State Univ., 540 P.2d 66, 73 (Kan. 1975)

APPENDIX G

IN THE SUPREME COURT FOR THE
STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,	)
Plaintiffs/Appellees,	)
-vs-	)No.84527
MISSOURI PACIFIC RAILROAD COMPANY, d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,	)
Defendant/Appellant.	)

DATE FILED
SUPREME COURT
AUGUST 2, 1996
JAMES W. PATTERSON, CLERK

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Defendant/appellant Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific"), respectfully asks this Court to grant a writ of certiorari to review the unpublished Court of Appeals opinion issued in this case on July 16, 1996. A copy of the opinion is attached. No rehearing was sought.

The opinion of the Court of Appeals decided a question of substance involving the preemption of federal law not heretofore determined by this court. In its effort to affirm a jury's verdict in a tragic case, the court erroneously decided that question of federal law in a way not in accord with applicable decisions of the Supreme Court of the United States. In so doing, the court also sanctioned such a departure from the accepted and usual course of judicial proceedings by a trial court as to call for the exercise of this court's power of supervision.

I

This is an appeal from a judgment on a jury verdict in a wrongful death lawsuit resulting from a train/pickup truck collision in 1991 in which six of the eight teenage truck passengers died. There was competent evidence presented that Jeremy Johnson, the driver of the truck, had driven up behind another vehicle which was waiting for the train to pass, then turned onto a street parallel to the tracks and accelerated toward the crossing two blocks south, where the collision occurred. Jeremy's parents sued Missouri Pacific and the train's engineer. The jury found *no* liability on the part of the engineer, and found Jeremy to have been *equally at fault* with Missouri Pacific. The jury returned a verdict against Missouri Pacific for $1 million in actual damages and $3 million in punitive damages. Judgment on the jury verdict was entered on November 21, 1994.

II

The basis of the plaintiffs' case was that a Missouri Pacific train, recklessly speeding through an ultrahazardous intersection, killed their son. The theory that the train was not merely speeding, but *wantonly* speeding, *permeated* the trial. Most significantly, the trial court lifted the cap on punitive damages because it expressly found, not that the

intersection was ultrahazardous or that Missouri Pacific was in some other way malicious, wanton or reckless, but that "[i]n my view, the evidence shows that if this train. . . had commenced slowing ... that this collision would not have occurred. There's absolutely no question in my mind that it would not have occurred the way it did occur."

It was undisputed that the train in question was going 48-50 mph at the time of the collision. The railroad tracks in Fort Gibson had a Class IV Federal Railroad Administration (FRA) classification. Under FRA rules, promulgated pursuant to the Federal Railroad Safety Act of 1970 (the FRSA), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§20101-26102 (1994), the maximum speed for freight trains on Class IV track is 60 mph. 49 C.F.R. § 213.9. Missouri Pacific was well within the federal speed limit at the time of the accident.

In 1973, however, Fort Gibson arguably had passed a city ordinance (never advertised, recorded or published) regulating train speed through town at 40 mph. It is noteworthy that on the evening of the collision, the weather was dry with good visibility and there were no other hazards apparent on the track. There was no finding by the jury that the engineer's speed was too fast for the particular track conditions at the time of the collision. Thus, the Plaintiffs relied solely on the 1973 ordinance to prove their theory that the train was speeding through town, rendering Missouri Pacific negligent *per se*. The trial court agreed with Plaintiffs, and instructed the jury accordingly.

III

Was Missouri Pacific's train speeding as a matter of law or not? Succinctly put, the primary question raised by this case is this: Which law governs the speed of a train through a city or town in Oklahoma - the FRSA or municipal ordinance? *The Court of Appeals' opinion fails*

to satisfactorily answer this question of significant importance to municipalities and to railroads operating within Oklahoma.

Section 20106 of the FRSA provides as follows:

> Laws, regulations and orders related to railroad safety shall be *nationally uniform* to the extent practicable. A *State* may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A *State* may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order-
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
> (2) is not incompatible with a law, regulation, or order of the United States government; and
> (3) does not unreasonably burden interstate commerce. (Emphasis added.)

The relevant legislative history makes clear that the purpose for which the statute was enacted was to create national uniformity of regulation, such as in the Natural Gas Pipeline Safety Act of 1968, thereby enhancing safety by eliminating 50 different judicial and administrative systems for railroads to follow. Obviously, allowance of control of train speed by thousands of separate local municipalities would annihilate this clearly-stated Congressional intent.

Recently, the U. S. Supreme Court in CSX Transportation v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 387 (1993) *affirmed in favor of the railroad* a grant of summary judgment on a widow's claim under state law for excessive speed when that speed was within the limits set under the FRSA. In Easterwood, as in this case,

the plaintiff's decedent was killed when a train collided with the truck he was driving. The plaintiff widow alleged that the railroad was negligent in failing to maintain adequate warning devices *and* for operating the train at excessive speed. The Court unequivocally held that the speed regulations issued by the Secretary of Transportation pursuant to the FRSA preempted state common law claims based on excessive train speed. Easterwood, 113 S.Ct. at 1743-1744. The Court stated:

> [R]elated safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort which respondent seeks to impose on petitioner.
>
> * * *
>
> Read against this background, § 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings. *Respondent nevertheless maintains that preemption is inappropriate because the Secretary's primary purpose in enacting the speed limits was not to ensure safety at grade crossing, but rather to prevent derailments. Section 434 does not, however, call for are inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter of train speed ....* We thus conclude that respondent's excessive speed claim cannot stand in light of the Secretary's adoption of the regulations in § 213.9 (footnote omitted). (Emphasis added.)

> We hold that, under the Federal Railroad Safety Act, federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed.

Id. at 1743-44.

Easterwood makes clear that a state-law claim for excessive train speed is preempted by the FRSA and cannot be maintained if the train was operating within the federally-mandated speed limit. Easterwood also makes clear that preemption is mandated regardless of the reason for the adoption of the Secretary's regulation (*e.g.* to prevent derailment). All lower federal courts which have directly addressed this issue have uniformly held that municipal regulation is preempted. *See, e.g.,* Eldridge v. Missouri Pac. R.R. Co., 832 F.Supp. 328 (E.D. Okla. 1993); Wright v. Illinois Cent. R.R. Co., 868 F.Supp. 183 (S.D. Miss. 1994); Armstrong v. Atchison, Topeka & Santa Fe Ry. Co., 844 F. Supp. 1152 (W.D. Tex. 1994).

The Court of Appeals' opinion in this case errs when it does not resolve or even discuss the merits of the federal preemption issue or clearly define Oklahoma law for the benefit of railroads and municipalities. Secondly, although the opinion *admits* that "we are constrained by stare decisis to follow the supreme court's [sic] interpretation that the federal regulations preempt an action based on excessive speed alone," it then fails to follow that clear precedent in its analysis and result. Following the precedent of Easterwood, the Court of Appeals should have found that the entire theory of excessive speed as negligence *per se* should not have been submitted to the jury as a matter of law. Instead, however, the appellate court chose to view excessive train speed not as a unified theory, but merely as a disparate series of rulings regarding the admission of various evidence, all of which it then affirmed. More substantially, it ignored the Easterwood precedent when it found no error in two jury instructions, one of which (Instruction No. 24) defined violation of the Fort Gibson ordinance as

negligence *per se* and the other (Instruction No. 25), to which the trial judge added the words "or municipality" to the otherwise exact quotation of FRSA § 20106, a completely arbitrary addition to Congress' actual wording. Instead of following Easterwood, the Court of Appeals merely finds the negligence *per se* instruction to be "perhaps erroneous," but not "prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction."

The appellate court's error is most evident on page two, where it *adopts the wrong standard of review*. It states that the issues to be reviewed are errors concerning the"admission of evidence and the conduct of the trial," and states as the standard of review "whether the trial judge abused his discretion in making his rulings and whether that abuse materially affected the substantial rights of the complaining party," citing Lee v. Volkswagen of America, Inc., 688 P.2d 1283 (Okla. 1984) and Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc., 713 P.2d 572 (Okla. 1985). However, submission of the speeding train evidence adds up to more than just the cumulative effect of disparate trial court rulings - it is a theory of recovery which the U.S. Supreme Court has found cannot be maintained. The correct standard of review is found in Vannerson v. Board of Regents, 784 P.2d 1053 (Okla. 1989). In Vannerson, a wrongful discharge case, much of the evidence relied upon by the plaintiff for recovery was based on an occurrence for which the plaintiff could not recover as a matter of law. This court stated:

> Although ordinarily a jury verdict will be sustained if supported by any competent evidence, (citation omitted), such is not the case if it is impossible on appellate review to separate plaintiff's possible recovery on properly submitted facts from his possible recovery on facts which should have not been submitted as a basis for recovery at all.

Id. at 1055-56, citing Guinn v. Church of Christ, 775 P.2d 766 (Okla. 1989). The Court of Appeals did not even attempt to determine whether or not it was impossible to separate plaintiff's recovery between properly and improperly submitted facts; had it done so, it would have found that the trial was so imbued with the admission of evidence surrounding the speed of the train, the passage of the preempted ordinance, repeated reference to the "speeding train," and the like so as to have put the jury in a complete muddle. It cannot be discerned whether the verdict was based on excessive train speed or whether it was based on failure to maintain a safe crossing and/or maintain an adequate warning system. These are completely separate duties owed by the railroad to the motoring public.

IV

The tenor and fairness of the trial was also materially and significantly affected by the submission of numerous items of evidence, to Missouri Pacific's undeniable prejudice, yet the Court of Appeals merely lumped all "rulings on the admissibility of evidence" into an overbroad, blanket affirmance. For example, the trial court admitted evidence of a prior accident and three "near misses" at the crossing in question. The prior accident, however, occurred almost twenty years before the collision in question. Plaintiffs argued that admission of the prior accident was proper to show the motivation of the city to pass the 1973 ordinance; however, instead of limiting the evidence to that fact, the court allowed admission of an old newspaper photograph, graphically depicting the fatality crash involved in the prior accident accompanied by a small, unrecognizable portion of the subject crossing, which could not be verified as bearing any similarity to the conditions existing on the night of the 1991 collision. The old photograph's probative value was vastly outweighed by its danger of unfair prejudice to Missouri Pacific.

Similarly, the trial court allowed evidence of three prior "near misses" at the crossing, all of which happened under materially different circumstances as the collision in question. Under its

generalized ruling regarding evidence, the Court of Appeals affirmed. This Court has made clear, however, that evidence of other railroad crossing accidents is inadmissible unless they happened under the same circumstances and at the same place as the accident involved in the suit. St. Louis-San Francisco Ry. Co. v. Powell, 385 P.2d 465, 468-9 (Okla. 1963), citing Foreman v. Chicago R.I. & P. Ry. Co., 74 P.2d 350, 352 (Okla. 1937). Prior "near misses" are considered under the same legal rubric as prior accidents. Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1089-90 (10th Cir. 1994). The prejudice to a defendant by the admission of such evidence cannot be overemphasized, and is *reversible error*. Roper v. Mercy Health Ctr., No. 84615, THE OKLAHOMA BAR JOURNAL, Vol. 66, No. 28, p. 2396-97 (July 18, 1995). This rule of exclusion has also been widely adopted in other jurisdictions. Carter v. Missouri Pac. R.R. Co., 681 S.W.2d 314, 316 (Ark, 1984); DeElena v. Southern Pac. Co., 592 P.2d 759, 764 (Ariz. 1979); Missouri Pac. R.R. v. Cooper, 563 S.W.2d 233, 236 (Tex. 1978); Mead v. Scott, 130 N.W.2d 641, 644 (Iowa 1964).

These are but two examples in which the Court of Appeals simply failed to apply the correct rule of law in its analysis of the numerous errors in the admission of evidence and conduct of the trial raised by this appeal.

V

The Court of Appeals' opinion further completely fails to address a critical error occurring after the jury had returned its verdict. In Jury Instruction No. 49, which was approved by all counsel, the jury was instructed as follows:

> If you find that the occurrence was directly caused by the negligence of either or both of Missouri Pacific Railroad and/or [Engineer] and the contributory negligence of Jeremy Michael Johnson, then you shall use the white verdict form, and you must determine the percentages of each party's negligence.

* * *

> You are instructed that if you use the white verdict form, whatever dollar amount you insert as the damages sustained by Plaintiffs *will be reduced by the court* by that percentage of negligence which you have attributed to Jeremy Michael Johnson. (Emphasis added.)

The jury returned a verdict finding Missouri Pacific 50% liable and Jeremy Johnson 50% liable. After the jury returned its verdict, however, the court, at Plaintiffs' behest, refused to reduce the damages awarded in accordance with what it had already told the jury, and denied Missouri Pacific the opportunity to propose additional, curative instructions. The trial court based its refusal to reduce the damages in accordance with Instruction No. 49 on the language in Graham v. Keuchel, 847 P.2d 342, 362-63 (Okla. 1993), regarding the unavailability of the contributory negligence defense in cases of willful or wanton conduct on the part of the defendant. In Graham, however, this court determined that a jury *must be instructed* that "while ordinary negligence of the plaintiff may be used as a defense against gross negligence, it may not be considered as a defense against any form of conduct found to be willful and wanton or intentional." *The jury was not so instructed.* It was thus completely misled as to the law and as to what the "bottom line" of damages awarded would be. This resulted in Missouri Pacific's liability for twice what the jury had intended.

Despite this prejudicial error, the Court of Appeals failed completely to address the issue or to order reversal of a clearly prejudicial instruction or order a remittur to bring the award in line with the jury's intent.

VI

Finally, the Court of Appeals ignored without comment Missouri Pacific's allegations of error on appeal regarding submission of punitive damages to the jury. First, as stated above, the sole reason

for the trial judge's ruling lifting the "cap" on punitive damages was because of the train's speed. As established by Easterwood, the train's speed did not even breach Missouri Pacific's duty of ordinary care, much less evidence wanton, oppressive, malicious or reckless conduct. The Court of Appeals did not even attempt to review the admission of evidence and instructions regarding punitive damages, other than to conclude, with incredible logic, that because the trial court and jury had found Missouri Pacific to be wanton and oppressive, etc., *submission of the admittedly erroneous train speed theory had not been prejudicial.* This clearly misses two obvious points - 1) if the jury had not been instructed that the train's speed was negligent, perhaps they would not have found Missouri Pacific's conduct wanton; and 2) ordinary negligence *per se* does not equal wanton conduct. The appellate court disregarded the law regarding the prerequisites for submission of punitive damages and failed to analyze the facts in accordance therewith.

Based on the foregoing errors, Missouri Pacific respectfully requests that this Court grant a writ of certiorari, vacate the opinion of the Court of Appeals and the trial court's judgment, and remand this action for further proceedings consistent with Oklahoma law and this Court's decision.

s/
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Jeannie C. Henry, OBA #12331
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(918) 587-3939

ATTORNEYS FOR DEFENDANT/
APPELLANT

Certificate of Mailing

I hereby certify that on this 1st day of August, 1996, a true and correct copy of the above and foregoing instrument was mailed, with postage thereon fully prepaid, to:

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Muskogee, OK 74402-1368

Adaina Riley, Clerk
Muskogee County District Court
P.O. Box 1350
Muskogee, OK 74402

_s/_____
Jeannie C. Henry

johnson\appeal\reply.wrt

APPENDIX H

IN THE SUPREME COURT FOR THE
STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,	)
Plaintiffs/Appellees,	)
-vs-	)No.84527
MISSOURI PACIFIC RAILROAD COMPANY, d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,	)
Defendant/Appellant.	)

DATE FILED
SUPREME COURT
AUGUST 21, 1996
JAMES W. PATTERSON, CLERK

DEFENDANT/APPELLANT'S REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Defendant/Appellant Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific") submits this Reply and respectfully asks this Court to grant a writ of certiorari to review the Court of Appeals' opinion which decided a question of substance involving the preemption of federal law not heretofore

determined by the Court nor in accord with applicable decisions of the Supreme Court of the United States.

I.

Since the preemptive Federal Railroad Safety Act of 1970, not one reported case has ever held (as this trial court instructed) that municipalities can regulate train speed. Every court that has directly addressed the authority of municipalities to regulate train speed under the FRSA has held that no such authority exists. See, e.g., Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973), cert. denied, 414 U.S. 855 (1973); Chesapeake & O. Ry. v. City of Bridgman, 669 F.Supp. 823, 826 (W.D. Mich. 1987). FRSA preempts municipal ordinances related to railroad safety, notwithstanding that the ordinance was promulgated under state constitutional authority. See, e.g., CSX Trans., Inc. v. City of Plymouth, Mich., 86 F.3d 626, 628 (6th Cir. 1996)

Plaintiffs' statement of the case is nothing more than a plea for sympathy. The statement distorts the record on appeal in an attempt to distract this Court from the legal issues which were not addressed by the Court of Appeals. The testimony of two unbiased witnesses showed that the sixteen year old Jeremy Johnson's pickup truck (in which five people were crammed in the cab and three in the covered pickup bed) had driven up behind a vehicle stopped at a railroad crossing. The lights were flashing and gates were coming down, and the driver turned on a parallel road and accelerated at a high rate of speed toward the Walnut Street crossing in an obvious attempt to beat the train. The record demonstrates that Jeremy Johnson was familiar with the characteristics of this railroad crossing.

Plaintiffs' statement that nine deaths occurred at Fort Gibson crossings in less than two years is misleading. Prior to Jeremy Johnson's accident, there had been only one known automobile/train accident in the city's history (which happened at the Walnut Street crossing in 1972, almost 20 years before).

Plaintiffs' statement that the Walnut crossing was one of the most hazardous crossings in Oklahoma is inaccurate. The Manager of Rail/Highway Safety for the Oklahoma Department of Transportation testified that the Walnut Street crossing was not high on the Department of Transportation hazard priority index and that none of the crossings in Fort Gibson would have qualified for improvements under that index. Fort Gibson was selected for a corridor project because the city had several crossings within a short track distance, some of which could be consolidated and eliminated, not because any of the crossings were extra-hazardous.

It was undisputed that Missouri Pacific was well within the federal speed limit (60 mph for Class IV track) pursuant to the Federal Railroad Safety Act of 1970 (the "FRSA"). The Plaintiffs discuss the Fort Gibson city ordinance regulating train speed through town at 40 mph as if it was common knowledge to the town and Missouri Pacific. However, the city ordinance was never contained in the ordinance book which was used by the law enforcement officers of the city. In fact, existence of the ordinance was unknown to the Fort Gibson's Mayor, Police Chief, police force and Missouri Pacific.

II.

The Plaintiffs claim that there is no federal preemption because the crossing was extrahazardous due to essentially local safety hazards, and that municipalities can regulate train speed under the FRSA. The United States Supreme Court in CSX Transportation v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 387 (1993), makes clear that a state-law claim for excessive train speed is preempted by the FRSA and cannot be maintained if the train was operating within the federally-mandated speed limit. The Easterwood exception governing "specific, individual hazards" does not authorize municipal regulation of train speed. In Easterwood, the Court referred to a common law duty to slow or stop the train to avoid a "specific, individual hazard". The Court did not decide whether any such duty actually existed or whether such a duty did exist, the FRSA would preempt it. However, it is clear

from the context of the Court's opinion that the "specific, individual hazard" exception discussed in Easterwood does not apply to the Walnut Street crossing. The presence, if any, of "specific, individual hazards" at the Walnut Street crossing is irrelevant to the authority of the City of Fort Gibson to enact a train speed ordinance.

Moreover, the Walnut Street crossing does not present a "specific, individual hazard" as that phrase has been interpreted by lower courts. See Herriman v. Conrail, Inc., 883 F.Supp. 303, 306-07 (N.D. Ind. 1995); Armstrong v. Atchison, Topeka & Santa Fe Ry. Co., 844 F.Supp. 1152 (W.D. Tex. 1994). Logically, "specific, individual hazard" relates to the avoidance of a specific collision, such as where an engineer sees a motorist stranded on the tracks in time to avoid the collision. See Herriman, 883 F.Supp. at 307; Armstrong, 844 F.Supp. at 1153.

The case of Missouri Pacific RR. Co. v. Lemon, 861 S.W.2d 501 (Tex. Ct. App. 1993), relied on by the Plaintiffs, does not support Plaintiffs' argument. In Lemon, the court held that "illegally and improperly parked tank cars created a specific, individual hazard ...". Id. at 510. The court did not rely on any other factor to justify this finding. Plaintiffs' list of factors concerning the physical characteristics of the crossing were not created by any illegal activity by Missouri Pacific.

The Court of Appeals' opinion errs when it did not follow the precedent of Easterwood and find that, as a matter of law, Plaintiffs' theory of excessive speed and jury instructions related to the same (including a negligence per se instruction) should not have been submitted to the jury.

III.

The sole basis for the submission of the issue of punitive damages to the jury was Missouri Pacific's non-compliance with the City of Fort Gibson's unauthorized (and unknown) train speed

ordinance. Therefore, the Court of Appeals erred in failing to reverse and remand the case to the trial court, with instructions to dismiss the claim for punitive damages.

IV.

The Court of Appeals failed to apply the correct rule of law in its analysis of the errors in the admission of a prior accident and three "near misses" at the crossing in question. Prior to the admission of any prior accident or near miss evidence, this Court requires a showing of substantial similarity with regard to speed and direction of train and vehicle, time of accident, traffic conditions, weather conditions and view of driver. St. Louis-San Francisco Ry. Co. v. Powell, 385 P.2d 465, 469 (Okla. 1963). Plaintiffs contend that there is no need to follow Oklahoma law because their evidence of prior accidents/near misses is admissible on the issue of knowledge. The cases relied on by the Plaintiffs are directly contrary to Oklahoma case law. Under Oklahoma law, to show notice or knowledge of a dangerous condition, prior accidents or near misses must be substantially similar to the accident and litigation in order to be admissible in evidence. Roper v. Mercy Health Center, No. 84615, THE OKLAHOMA BAR JOURNAL, Vol. 66, No. 28, p. 2396-97 (July 18, 1995); Perry v. City of Oklahoma, 470 P.2d 974 (Okla. 1974). Failure of the trial court to require such a showing is reversible error. Roper v. Mercy Health Center, 66 O.B.J. at 2397.

V.

The Court of Appeals opinion failed to address the prejudicial error of the trial court in refusing to reduce the damages in accordance with Jury Instruction No. 49. The instruction, which was approved by all parties, informed the jury that any finding of contributory negligence would reduce Plaintiffs' actual damages. The actions of the Plaintiffs' counsel in proposing Instruction No. 49 and arguing the effect of same to the jury should constitute an estoppel or waiver of any right to later contend that the damage award should not be reduced.

Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989); Willard v. Ward, 875 P.2d 441 (Okla. Ct. App. 1994).

Based on the foregoing errors, Missouri Pacific respectfully requests that this Court grant a writ of certiorari, vacate the opinion of the Court of Appeals and the trial court's judgment, and remand this action for further proceedings consistent with Oklahoma law and this Court's decision.

s/

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Certificate of Mailing

I hereby certify that on this 21st day of August, 1996, a true and correct copy of the above and foregoing instrument was mailed, with postage thereon fully prepaid, to:

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Respectfully submitted,

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